SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-727

ROY GENE LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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ROY GENE LEWIS,

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UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 15, 1973.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported and is printed in full as an Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1973. A timely Petition for Rehearing En Banc was filed by Petitioner but was denied by the Court of Appeals on October 3, 1973. The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

Question Presented.

In a perjury prosecution what standard of proof should be applied to determine whether sufficient circumstantial evidence has been offered to corroborate the testimony of a single witness, who has sworn to the falsity of the alleged perjurious statement?

Statute Involved.

18 U.S.C. §1621 provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Statement.

Petitioner Roy Gene Lewis was indicted on three counts of perjury in violation of 18 U.S.C. §1621, in that he allegedly falsely testified before a federal grand jury on July 31, 1970. Upon conclusion of a bench trial, the Honorable William P. Gray acquitted petitioner on Counts One and Two but found him guilty on Count Three. Lewis was sentenced to a two-year prison

term, with six months to be served and the balance suspended. In addition, he was placed on probation for two years.

The subject matter of Count Three was a $200,000 loan fee paid by the Beverly Hillcrest Hotel of Beverly Hills, California in connection with a $3,500,000 loan obtained from the Central States Southeast and Southwest Areas Pension Fund. Certain preliminary facts were never in dispute either before the grand jury or at the trial. The $3,500,000 loan was consummated through the Title Insurance and Trust Company in December, 1967. Pursuant to the escrow instructions, Petitioner Lewis was paid $50,000 for services rendered in obtaining the loan. Beverly Hillcrest paid an additional $200,000 finder's fee to the Pacific American Investment Company of Hong Kong. Howard Neidich, the prosecution's principal witness and an acknowledged perjurer, caused the $200,000 to be wired to Pacific American's Hong Kong bank. The gist of Count Three was that Petitioner Lewis had "heard" or "learned" that one Leonard Bursten had returned the $200,000 or a portion thereof from Hong Kong to the United States.

In particular, Count Three charged Lewis as follows:

"COUNT THREE

[18 U.S.C. §1621]

"The Grand Jury realleges and incorporates by reference paragraphs one and two of Count One above.

Q. Now what was your understanding of the total fee that was to be paid by the Beverly Hill-

crest in return for receiving the Pension Fund loan?

A. $250,000.

Q. $250,000, sir?

A. Yes, sir.

Q. And how large a loan was it?

A. Three and a half million.

Q. And how much were you to receive of the $250,000?

A. $50,000.

Q. And what was to be done with the remaining two hundred thousand?

A. To be paid to Pacific American." [Grand Jury Transcript, p. 18, line 14, to p. 20, line 1.]

"Q. Now, have you heard from any source that this $200,000 was sent to the account of Pacific American Investment in Hong Kong?

A. Yes, I assumed it was.

Q. And have you ever heard from any source that this $200,000 or a portion thereof was returned to the United States by Mr. Bursten?

A. No, sir." [Grand Jury Transcript, p. 24, lines 13-20.]

"Q. Did Mr. Bursten ever indicate to you that he had brought any or all of that $200,000 back from Hong Kong to Los Angeles?

A. No, sir.

Q. Did you ever learn of that from any source whatsoever?

A. No, sir." [Grand Jury Transcript, p. 25, lines 17-23.]

"Any such testimony was false and contrary to the oath taken by ROY GENE LEWIS as he then well knew in that the $250,000 or a portion

thereof had been returned to the United States by Mr. Bursten.

In violation of Section 1621, Title 18, United States Code".

The prosecution's case included the testimony of witnesses Bulasky and Winters, owners of the Beverly Hillcrest Hotel; Greene, attorney for Beverly Hillcrest; and Woltag, who was the Hong Kong manager of Pacific American Investment Company. The dominant reason for their testimony was to establish (1) that Petitioner Lewis knew that the subject $200,000 was forwarded to Pacific American in Hong Kong and (2) that Leonard Bursten traveled to Hong Kong in January, 1968, converted $200,000 to cash and departed. None of these witnesses related any significant facts which would corroborate the perjury charge that Lewis was informed that Bursten had returned to the United States with the money.

The principal government witness was Howard Neidich, president of Interstate Excavation Co. Interstate had an earthmoving contract involving millions of dollars with Beverly Ridge Estates Corporation, whose general manager was Leonard Bursten. With respect to the specific charge in issue, Neidich testified that he and a Mr. Kenny Pinns met Leonard Bursten in Canada, and the three of them returned to Los Angeles. [Tr. 52.][1] Neidich asserted that on arrival they immediately proceeded to the Beverly Ridge offices where Bursten and Neidich met alone while Pinns remained outside. According to Neidich, Bursten produced a manila envelope from which he extracted $25,000 and gave it to Neidich allegedly as a repayment of an

[1]Citation is to the trial transcript.

Interstate Excavation Co. loan of $25,000 to Petitioner Lewis. [Tr. 58.] Neidich next claimed that Lewis was present outside the office and that he told Lewis that Bursten had paid the $25,000 Lewis owed to Interstate [Tr. 58.][2] Neidich further testified that he and Bursten met Lewis the next morning at the airport and that Bursten handed Lewis a package which Bursten stated contained the money he brought back from Hong Kong. [Tr. 59.]

On cross-examination, Neidich admitted he never saw how much money Bursten had in the manila envelope and noted that the money was never counted in his or Lewis' presence. [Tr. 104.] Neidich could not identify the package handed to Lewis at the airport as the manila envelope nor was he, or any other witness, aware of the contents of the package. [Tr. 61.] To support his defense, Lewis offered evidence that he had been engaged by Interstate Excavation to obtain contracts for the construction of garages in the Los Angeles area. [Tr. 34.] Lewis stated that he assumed that the unopened package handed to him at the airport contained building plans which he was to deliver to a building contractor.

In addition, though the government acknowledged that Neidich had committed perjury on prior occasions, it refused to call Kenny Pinns, Leonard Bursten or any other witness to testify concerning the events from the time Bursten returned from Hong Kong until the meeting with Lewis at the airport. Furthermore, though Neidich admitted on cross-examination that the Inter-

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[2]Contrary to Neidich's testimony, Lewis offered substantial evidence to establish that Interstate extended the $25,000 loan to be used for the purchase of equipment and that Lewis himself had repaid the loan. [Tr. 31, 83, 241-42.]

state books would indicate that the loan was repaid on the day after he received the $25,000 from Bursten, the prosecution again refused to produce Interstate's books. Lewis' counsel had specifically invited the government to settle this issue by producing such records and called to the trial court's attention the fact that the prosecuting attorneys had admitted possession of such accounting records. Despite such invitation the government did not produce Interstate's records nor deign to offer an explanation. [Tr. 230.]

Though he acknowledged Neidich's perjurious background, the district court judge chose to believe his testimony on Count Three. The Ninth Circuit affirmed Lewis' conviction asserting that there was sufficient evidence and that the finding of guilt was not clearly wrong. (App. 2, 3.)[3] In support of its affirmance the appellate court cited certain prosecutorial evidence, none of which, however, could support the charge that Lewis "knew" the money was returned to the United States by Bursten. What is clear is that the Ninth Circuit, as well as the district judge, relied almost exclusively on the testimony of Neidich. This is readily apparent from the Ninth Circuit's deviation from its prior standards of proof required in perjury cases and its adoption of the totally circumstantial evidence "balance of probabilities test" of *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969) to perjury cases.

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[3]Citation is to the opinion of the Court of Appeals which is attached hereto as an Appendix.

REASONS FOR GRANTING THE WRIT.

This Court should grant this petition for a writ of certiorari for two fundamental reasons: (1) there exists a clear discrepancy among the Circuit Courts of Appeal as to the standard to be applied in determining the sufficiency of evidence necessary to corroborate a single direct witness' testimony in a perjury prosecution; and (2) the Ninth Circuit has specifically disavowed this Court's directive set forth in *Weiler v. United States,* 323 U.S. 606, requiring strict standards of proof in perjury cases.

Unlike most criminal cases wherein the testimony of one witness entitled to belief is sufficient to convict, it has been the long-standing rule in perjury prosecutions "that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." *Weiler v. United States,* 323 U.S. 606, 607. Stated in an affirmative manner "the falsity of testimony in a perjury case must be proved by the testimony of two witnesses, or the testimony of one witness, plus some other corroborative evidence." *Hammer v. United States,* 271 U.S. 620, 626-27. The most obvious purpose of the rule was to avoid prosecutions resting solely upon "an oath against an oath." Justice Black in *Weiler* clearly analyzed the historical and practical need for the more restrictive burden of proof and specifically rejected the government's request to abandon the necessity of corroboration of a single witness. In so holding this Court set forth the determinative rules to weigh the sufficiency of corroboration:

> "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that

> the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy." *Weiler v. United States,* 323 U.S. 606, 610.

Since *Weiler,* the lower courts have generally accepted the proposition that perjury must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed wilful and corrupt perjury. See *e.g., Vuckson v. United States,* 354 F.2d 918, 920 (9th Cir. 1966); *Brown v. United States,* 245 F.2d 549, 556 (8th Cir. 1957). While accepting these basic tenets, however, the individual circuits have differed considerably as to their particular application and there has developed in the Ninth Circuit an outright disavowance of the rules set forth in *Weiler.*

The discrepancy in the individual circuits relates to the specific rule to be followed concerning the sufficiency of evidence necessary for corroboration. For example, the Second Circuit has asserted that the corroborative circumstantial evidence must be "of a quality to assure that a guilty verdict is solidly founded" and "must be such that, were it standing alone, it would have independent probative value." *United States v. Freedman,* 445 F.2d 1220, 1226 (2d Cir. 1971).

The Sixth Circuit has evidently expanded on this concept for it follows the rule that "when the courts speak of corroborative evidence they mean *evidence aluinde*—evidence which tends to show the perjury independently." *United States v. Thompson,* 379 F.2d 625, 627 (6th Cir. 1967). In addition to such independent character, however, the Sixth Circuit has

held that to support a perjury conviction the testimony of a single witness must be corroborated by circumstances "inconsistent with the innocence of the accused." *United States v. Erhardt,* 38 F.2d 173 (6th Cir. 1967); *United States v. Thompson,* 379 F.2d 625 (6th Cir. 1967); *Hug v. United States,* 329 F.2d 475 (6th Cir. 1964). *Cf., United States v. Rose,* 215 F.2d 617 (3d Cir. 1954).

While the Fifth Circuit apparently accepts the foregoing necessity for corroborative evidence to be *evidence aluinde* and inconsistent with the innocence of the defendant, it asserts that the corroborating evidence need not be sufficient to establish independent commission of the crime charged beyond a reasonable doubt or even by a preponderance of the evidence. *Paternostro v. United States,* 311 F.2d 298 (5th Cir. 1962). The Fifth Circuit, however, did not define what exactly would be sufficient corroborative evidence.

The Ninth Circuit has embarked on its own course in determining what corroborating evidence is necessary. In *Vuckson v. United States,* 354 F.2d 918, 920 (9th Cir. 1966) while acknowledging the necessity of "direct and positive evidence", the Ninth Circuit eliminated the need for any "live" oral testimony holding written evidence in and of itself sufficient. The court justified this result by asserting that such evidence must establish the fact without the necessity for any inference based on human experience. Accord, *United States v. Brandyberry,* 438 F.2d 226, 227 (9th Cir. 1971).

In *Whaley v. United States,* 362 F.2d 938, 939 (9th Cir. 1966) the Ninth Circuit returned to the restrictive proof necessary for perjury prosecutions and reaffirmed its rule that "while circumstantial evi-

dence may support a conviction, it must be adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt". See also, *Woxberg v. United States,* 329 F.2d 284 (9th Cir.) *cert. denied,* 379 U.S. 823 (1964); *Byrnes v. United States,* 327 F.2d 825 (9th Cir.), *cert. denied,* 377 U.S. 970 (1964).

In 1970 the Ninth Circuit again deviated from the general rule of proof in perjury cases holding that where a perjury prosecution is premised on the state of mind of the declarant—that is, he asserts he does not remember a certain event—the perjury may be proved by circumstantial evidence alone. *Gebhard v. United States,* 422 F.2d 281, 287-88 (9th Cir. 1970). The apparent problems of *Gebhard,* when the rule should apply and to what extent could circumstantial evidence be used to prove perjury, were soon raised in *United States v. Cook,* 12 CrL 2013 (9th Cir. August 23, 1972). Judge Ely's original dissent criticized the extension of the *Gebhard* rule apparent in the majority's affirmance. The *Cook* opinion was subsequently withdrawn by order of court.

In the instant case the Ninth Circuit has chosen to overrule *sub silentio* its own decision in *Whaley* as well as adopting the "balance of probabilities test" of *United States v. Nelson,* 419 F.2d 1237 (9th Cir. 1969) to perjury prosecutions in direct contravention of this Court's decision in *Weiler v. United States,* 323 U.S. 606.

> "The law of this circuit does not require that the evidence must exclude every reasonable hypothesis except guilt to sustain a conviction. The balance of probabilities test of United States v. Nelson (9th Cir. 1969) 419 F.2d 1237 applies." (App. 2, 3.)

Considering that *Nelson* was a bank robbery case prosecuted exclusively by circumstantial evidence, the clear effect of this holding is to end the unique and heretofore protective burden of proof required in perjury cases. There is no necessity for any "live" testimony nor any need for direct and positive evidence. All perjury prosecutions in the Ninth Circuit will henceforth be submitted solely on circumstantial probabilities.

Petitioner Lewis herein requests a writ of certiorari so this Court might end the practice of evidential roulette and set forth a uniform rule defining the necessary corroboration in perjury prosecutions under 18 U.S.C. §1621. As is readily apparent from a review of the facts in this case, Lewis would not have been convicted under the standards of proof existent in other federal jurisdictions. A defendant's right to a fair trial should not hinge on such circumstances especially when such a rule is contrary to existing directives of this Court.

Respectfully submitted,

E. L. FRASER,
Counsel for Petitioner.

APPENDIX.

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 73-1337 USA VS. ROY GENE LEWIS

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-15-73 Affirmed, the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews, Clerk
U.S. Court of Appeals

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Roy Gene Lewis, Appellant. No. 73-1337.

Appeal From the United States District Court for the Central District of California.

Before: LUMBARD, MERRILL, and HUFSTEDLER, Circuit Judges

Filed June 15, 1973.

The evidence was sufficient to sustain the conviction. The district court was fully aware that Neidich's testimony had to be subjected to close scrutiny because Neidich had perjured himself on other occasions and was deeply implicated in illegal conduct. Neidich's testimony was corroborated by circumstantial evidence and, in some respects, by Lewis' own testimony before the grand jury. From his testimony, we know that Lewis knew about the routing of funds through Hong Kong, that Lewis received a package from Bursten when Bursten returned from Hong Kong, and that Lewis relayed the package to Kovens in Florida. If Lewis knew that the package contained proceeds of the Hong Kong fund, he surely perjured himself before the grand jury. Lewis explained that he assumed that the package contained building plans. The district court did not believe that Lewis' conduct was consistent with the explanation, and neither do we. The district court credited Neidich's testimony that Lewis asked Bursten where the money was and that Bursten said "Here it is," and gave him the envelope. That finding is not clearly wrong.

The law of this circuit does not require that the evidence must exclude every reasonable hypothesis ex-

cept guilt to sustain a conviction. The balance of probabilities test of *United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237 applies. We cannot say that the evidence, considered as a whole, failed to meet both the *Nelson* test and the strict standards of proof required in a perjury case.

The transcript of Lewis' grand jury testimony, including the administration of the oath, was admitted by stipulation. Proof that the oath was taken was adequate. (*Vuckson v. United States* (9th Cir. 1966) 354 F.2d 918.)

The record does not sustain the contention that the Government improperly withheld evidence or presented tainted evidence.

AFFIRMED.